

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 03-32378

SHARON COX MYNATT

Debtor

SHARON MYNATT, on behalf of
herself and derivatively on behalf
of the corporation MYNATT & SON
CONSTRUCTION CO., INC.

Plaintiff

v.

Adv. Proc. No. 03-3125

SHEILA RICE, GREG MYNATT and
GREG MYNATT CONSTRUCTION, LLC

Defendants

MEMORANDUM

APPEARANCES: HODGES, DOUGHTY & CARSON
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RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

This adversary proceeding is before the court upon the Notice of Removal of State Court Civil Action to Bankruptcy Court (Notice of Removal) filed on July 23, 2003, by the Chapter 7 Trustee, Dean B. Farmer, pursuant to 28 U.S.C.A. § 1452 (West 1994) and Federal Rule of Bankruptcy Procedure 9027. The Debtor originally commenced this civil action in the Chancery Court for Union County, Tennessee, docket number 4103, on October 25, 2001, seeking injunctive relief and imposition of a constructive trust, together with a money judgment, against the Defendants. The Debtor also demanded a jury trial.

The Trustee contends that this is a core proceeding pursuant to 28 U.S.C.A. § 157(b)(2)(A), (E), and (O) (West 1993), and that the bankruptcy court has jurisdiction pursuant to 28 U.S.C.A. § 1334(b) (West 1993 & Supp. 2003). Additionally, in the event that the action is not a core proceeding, the Trustee consented to entry of a final order or judgment by the bankruptcy court pursuant to 28 U.S.C.A. § 157(c) (West 1993).

I

The Debtor filed a Verified Complaint against the Defendants on October 25, 2001, in the Chancery Court for Union County, Tennessee (the State Court Lawsuit), alleging that the Defendants (1) unilaterally removed her as a director and officer of Mynatt & Son Construction Co., Inc. (the Corporation), replacing her with the Defendant, Sheila Rice (Ms. Rice); (2) transferred proceeds from house sales belonging to the Corporation to Greg Mynatt Construction, LLC (the Defendant Company); (3) transferred the assets from the Corporation to the Defendant Company; (4) transferred inventory from the Corporation to the Defendant

Company; (5) transferred ownership of the Corporation's work-in-progress to the Defendant Company; (6) failed to pay debts of the Corporation that had been personally guaranteed by the Debtor; (7) have acted in bad faith, without reasonable care, and not in the Corporation's best interests, thus violating their fiduciary duties to the Corporation; (8) engaged in unlawful conflict-of-interest transactions; (9) made unlawful distributions from the Corporation; (10) engaged in the unauthorized and unlawful sale of Corporation assets outside the ordinary course of business; and (11) denied the Debtor access to the books and financial records of the Corporation. The Debtor averred that these actions constituted conversion and/or misappropriation, breaches of their fiduciary duties, breaches of their duties of loyalty, civil conspiracy, and unjust enrichment. In addition to monetary damages to recoup the alleged transfer of property, the Debtor also requested punitive damages and attorneys' fees. Finally, the Debtor sought the following equitable relief: (1) an injunction prohibiting the Corporation or the Defendant Company from advancing expenses to the individual Defendants, (2) an injunction prohibiting the dissipation or transfer of any further assets of the Corporation and/or the Defendant Company; (3) imposition of a constructive trust as to all of the Defendant Company's assets, work-in-progress, and business opportunities, as well as that of any future company created by the Defendants; (4) an accounting of the financial affairs of the Corporation, the Defendant Company, and each individual Defendant; and (5) appointment of a receiver to manage the affairs and assets of the Corporation and the Defendant Company pending resolution of the lawsuit.

On or about July 23, 2002, the Defendants filed their Answer and Counterclaim Answer [sic]. They denied the Debtor's allegations and asserted that granting the relief sought

in the Complaint would unreasonably encumber the Defendant Company's operations. Additionally, the Defendants asserted a counterclaim against the Debtor, alleging that the Debtor and the Defendant, Greg Mynatt, had been 50/50 shareholders of the Corporation until the parties were divorced. Thereafter, the Defendants averred that the Debtor (1) attempted to destroy the business, in breach of her fiduciary duties and duties of loyalty; (2) abandoned the Corporation; (3) failed to provide agreed upon training to Ms. Rice; (4) made an unauthorized transfer of \$80,000.00 from the Corporation for her personal use; (5) falsely claimed \$20,000.00 from two house contracts; (6) falsely assured the Defendants that the Corporation had working capital and that all bills were current; (7) wrote letters to creditors and suppliers of the Corporation, advising that she was no longer involved in and would no longer accept liability for the Corporation's debts, constituting an interference with contracts; (8) failed to satisfy an obligation owed to a creditor of the Corporation, despite a pending lawsuit against the Corporation by the creditor; (9) obstructed access to the Corporation's computer system by installing passwords without providing the passwords to the Defendants; and (10) removed business documents from the Corporation and has refused to return them. The Defendants argued that the Debtor has unclean hands, and countersued for monetary damages, interest, punitive damages, and attorneys' fees.

On August 23, 2002, the Debtor filed the Counter-Defendant's Initial Answer to Counterclaim and Motion to Dismiss, whereby she entered a general denial of the allegations set forth in the counterclaim and requested that the court dismiss the Defendants' counterclaim for failing to state a claim upon which relief could be granted. It appears that no additional pleadings or documents have been filed or entered in the State Court Lawsuit.

The Debtor filed the voluntary petition initiating her case under Chapter 7 of the Bankruptcy Code on April 28, 2003, and the Chapter 7 Trustee was duly appointed. On July 23, 2003, the Trustee filed the Notice of Removal and the Process and Pleadings Accompanying Notice of Removal of State Court Civil Action. Because the Complaint contained a jury demand, the court entered an Order on September 2, 2003, advising the parties that they could consent to having the jury trial conducted by the bankruptcy judge by jointly or separately filing a written statement of consent within thirty days.¹ Additionally, the court directed the parties to file, within thirty days, a written statement either consenting or not consenting to entry of a final order and/or judgment by the bankruptcy court on all non-core but related issues.² None of the parties has consented to a jury trial by the bankruptcy judge, and only the Trustee has consented to entry of a final order and/or judgment by the bankruptcy court.

II

The Trustee, on behalf of the Debtor's bankruptcy estate, removed this proceeding from the Union County Chancery Court pursuant to 28 U.S.C.A. § 1452, which states:

(a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this

¹ See 11 U.S.C.A. § 157(e) (West 1993 & Supp. 2003); FED. R. BANKR. P. 9015(b).

² See 11 U.S.C.A. § 157(c)(2).

subsection remanding a claim or cause of action, or a decision not to remand, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.

28 U.S.C.A. § 1452; *see also* FED. R. BANKR. P. 9027 (governing removal).

The bankruptcy court has the following limited jurisdiction over bankruptcy cases and those related to the bankruptcy cases:

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(c)(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

(d) Any decision to abstain or not to abstain made under this subsection (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

28 U.S.C.A. § 1334 (West 1993 & Supp. 2003).

Pursuant to § 1334(c)(1), the bankruptcy court may decide, sua sponte, to abstain from either core or non-core proceedings. *Luan Inv. S.E. v. Franklin 145 Corp. (In re Petrie Retail, Inc.)*, 304 F.3d 223, 232 (2d Cir. 2002) ("Permissive abstention . . . under 28 U.S.C. § 1334(c)(1) is left to the bankruptcy court's discretion."); *Gober v. Terra + Corp. (In re Gober)*, 100 F.3d 1195, 1206, 1207 n.10 (5th Cir. 1996) ("A court . . . may abstain at its discretion from deciding either core or non-core proceedings under § 1334(c)(1) if the interests of justice, comity, or respect for state law so require."). Courts generally look to the following factors when making the determination whether to abstain:

(1) the effect or lack thereof on the efficient administration of the estate if a court recommends abstention; (2) the extent to which state law issues predominate over bankruptcy issues; (3) the difficulty or unsettled nature of the applicable law; (4) the presence of a related proceeding commenced in state court or other nonbankruptcy court; (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334; (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; (7) the substance rather than form of an asserted core proceeding; (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court; (9) the burden of the bankruptcy court's docket; (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties; (11) the existence of a right to a jury trial; and (12) the presence in the proceeding of non-debtor parties.

Beneficial Nat'l Bank USA v. Best Reception Sys., Inc. (In re Best Reception Sys., Inc.), 220 B.R. 932, 953 (Bankr. E.D. Tenn. 1998).

Here, all of the causes of action and damages associated therewith concern Tennessee corporate and contract law and, admittedly, could affect administration of the Debtor's bankruptcy estate. Nevertheless, "Congress has 'left the determination of property rights in the assets of a bankrupt's estate to state law,' since such 'property interests are created and defined by state law.'" *Nobelman v. Am. Sav. Bank*, 113 S. Ct. 2106, 2110 (1993) (quoting *Butner v. United States*, 99 S. Ct. 914, 917-18 (1979)). Accordingly, state law governs this action.

The Debtor and the Defendants each allege violations of the Tennessee Business Corporation Act,³ including breach of fiduciary duties, breach of duties of loyalty, unlawful removal, and failure to provide access to corporate records. Additionally, the parties allege common law causes of action including conversion, interference with contract, civil conspiracy, unjust enrichment, unclean hands, imposition of a constructive trust, and injunctive relief.

Clearly, adjudication of these issues, whether in the Debtor's favor or not, could affect the bankruptcy estate. However, none of the primary issues to be adjudicated are bankruptcy related. One hundred percent of the Debtor's remedies at law concerning violations of the Tennessee Business Corporation Act are governed by state law. Furthermore, the remaining bases for the Debtor's claims against the Defendants, including the equitable requests for imposition of a constructive trust and injunctive relief, are founded entirely upon state common law contract and tort issues. Because there are no bankruptcy law issues to be decided, the court believes that the Chancery Court for Union County, Tennessee is better suited for entering judgment based upon

³ See Title 48, Chapters 11 through 27 of the Tennessee Code Annotated (2002 & Supp. 2003).

the Debtor's and the Defendants' state law claims. Furthermore, all parties to the adversary proceeding have not filed their respective consent to having the bankruptcy judge enter final judgment or preside over a jury trial in the bankruptcy court. For these reasons, the court will exercise its discretion under § 1334(c)(1) and will abstain from hearing this adversary proceeding removed from the Chancery Court for Union County, Tennessee.⁴

Having decided to abstain from hearing this adversary proceeding, the court will also remand this action back to the Chancery Court for Union County, Tennessee. Remand of a removed proceeding is governed by 28 U.S.C.A. § 1452(b), and may be raised sua sponte for any equitable ground. See 11 U.S.C.A. § 1452(b); *Best Reception Sys., Inc.*, 220 B.R. at 958. Generally, a court makes the same considerations regarding abstention and remand, such that "where the facts before the court mandate or compel abstention, equitable grounds for remand exist under § 1452(b) and remand of the proceeding to state court is favored." *Best Reception Sys., Inc.*, 220 B.R. at 958.

An Order consistent with this Memorandum will be entered.

FILED: October 10, 2003

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

⁴ For a detailed discussion regarding mandatory and permissive abstention, see *Beneficial Nat'l Bank USA v. Best Reception Sys., Inc. (In re Best Reception Sys., Inc.)*, 220 B.R. 932 (Bankr. E.D. Tenn. 1998).

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ORDER

For the reasons stated in the Memorandum filed this date, the court directs the following:

1. The court abstains from hearing this adversary proceeding.
2. The Plaintiff's action is remanded to the Chancery Court for Union County, Tennessee.

SO ORDERED.

ENTER: October 10, 2003

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE